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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appln. No:

10/712,637

Applicant:

Lapthe Chau Flora

Filed:

11/13/2003

Title:

LENS CAP RETENTION ARRANGEMENT

TC/A.U.:

2872

Examiner:

Thong Q. Nguyen

Confirmation No.:

Docket No.:

ITDE-PNV110US

APPELLANT'S BRIEF (37 C.F.R. § 41.37)

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Sir:

This brief is in furtherance of the Notice of Appeal, filed in this application on January 19, 2005.

The fees required under § 41.20(b)(2), and any required petition for extension of time for filing this brief and fees therefore, are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

This brief contains these items under the following headings, and in the order set forth below (37 C.F.R. § 41.37):

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TRANSMITTAL FORM

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First Named Inventor	Lapthe Chau Flora
Art Unit	2872
Examiner Name	Thong Q. Nguyen
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ENCLOSURES (Check all that apply)							
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Amendment/Reply After Final Affidavits/Declaration(s) Extension of Time Request Express Abandonment Request Information Disclosure Statement Certified Copy of Priority Document(s)	Petition Petition to Convert to a Provisional Application Power of Attorney, Revocation, Change of Correspondence Address Terminal Disclaimer Request for Refund CD, Number of CD(s) Landscape Table on CD		Appeal Communication to Board of Appeals and Interferences Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) Proprietary Information Status Letter Other Enclosure(s) (please identify below): 1 pg. Credit Card Payment Form				
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A. The Final Rejection Did Not Properly Construe The Scope and Content of the Prior Art

- 1. The First Error
- 2. The Second Error
- 3. The Third Error
- 4. The Scope and Content of the Prior Art Do Not Support A Conclusion of Obviousness
- B. The Final Rejection Is Based on Hindsight
- C. Conclusion

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I. Real Party In Interest

The real party in interest in this appeal is ITT Manufacturing Enterprises, Inc. (ITME), a wholly owned subsidiary of ITT Industries, Inc.. An Assignment from the inventors to ITME was recorded on November 13, 2003 at Reel 014706, Frame 0397.

II. Related Appeals and Interferences

There are no other appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board's decision in this appeal.

III. Status of Claims

The status of the claims in this application are:

A. <u>Total Number of Claims in Application</u>

Claims in the application: 1-19.

B. Status of All The Claims

- 1. Claims cancelled: 1-6, 14, 16 and 17
- 2. Claims withdrawn from consideration but not cancelled: none
- 3. Claims pending: 7-13, 15, 18 and 19
- 4. Claims allowed: none
- 5. Claims rejected: 7-13, 15, 18 and 19.

C. <u>Claims on Appeal</u>

The claims on appeal are: 7-13, 15, 18 and 19.

IV. Status of Amendments

An Amendment Under 37 C.F.R. § 1.116 was filed on December 9, 2004. An Advisory Action mailed January 5, 2005 stated that the proposed amendments will be entered for purposes of the Appeal. Accordingly, the claims reproduced in the Claims Appendix are the claims as amended by the December 9th Amendment.

V. Summary of Claimed Subject Matter

The parenthetical citations are either to pages and lines of the specification or to reference numerals appearing in the drawing as should be evident from the context.

This invention relates to apparatus used primarily by military personnel to enhance their night vision (page 2, lines 3-5) and also by law enforcement officers and rescue workers. It should be evident that night vision apparatus is most usually used in the dark, often in extreme weather conditions and in times of personal danger.

As will be more clearly explained hereinafter, night vision assemblies include a lens cap (62) which fits with the objective lens assembly (42) to protect the objective lens (48) when the night vision device is not in use (page 1, lines 7-10). When the night vision device is in use, the lens cap (62) is removed from the lens assembly (42). After removal it is important that the lens cap (62) not be lost. It is also important that it be easily removed from and reassembled to the lens assembly (42) (page 1, lines 10-13). Imagine a soldier, law enforcement officer or rescue worker using the night vision device and trying to manipulate the lens cap (62) to remove it, keep track of it and reassemble it in the dark, under harsh weather conditions and during personally dangerous situations. The problems are unique and evident.

One attempt to address these problems involves using a cord (60) or the like to tether the lens cap (62) to the night vision device so that these two items are not disassociated when the night vision device is in use (page 1, lines 13-15). While the tether arrangement keeps the lens cap from being lost it presents a dangling lens cap which can become entangled with the user, the user's clothing or accessories (page 2, lines 1 and 2). Under high wind conditions the lens cap can be buffeted by high winds, strike the user's face and create a distraction (page 2, lines 3-8). Consider all the problems created by dangling lens cap in the context of a user working in the dark, in harsh weather and under dangerous conditions.

It is important to understand that the user of night vision devices cannot afford the distraction of manipulating complex apparatus in the dark, in harsh weather and/or under dangerous conditions.

The claimed invention solves these problems with an arrangement that is simple and easily usable.

The invention includes an image intensifier device (20) including a housing (50) having an objective lens assembly (42) and an eye piece lens assembly (30). The objective lens assembly (42) includes a cylindrical portion (46) that carries a lens (48) mounted for receiving low intensity light. An image intensifier tube is located in the housing for converting the low intensity light to a visible image which is seen through the eye piece lens assembly (30).

The invention further includes a lens cap (62) configured to be removably retained on the cylindrical portion (46) with an interference fit to protect the lens (48) when the device (20) is not in use.

A fastener assembly (239) operatively associated with the image intensifier device (20) includes an enlarged head, sometimes referred to as a knob (240), having substantially the same cross-sectional shape and size as the generally cylindrical portion (46) of the housing (50). Thus, the lens cap (62) can be moved from the housing's cylindrical portion (46) and retained on the enlarged head or knob (240) of the fastener assembly (239) with an interference fit.

Note that the lens cap 62 can be tethered to the housing 50 by a nylon cord (60) or by a similarly flexible cable. See claims 12, 13, and 19. In addition, note that the image intensifier device (20) is a monocular. See claim 13.

In addition, the invention includes a mounting adapter 200 operative to secure the night vision device to a head mount or helmet mount carried on a head harness or helmet worn by the user or to a small arms mounting adapter (page 5, lines 14-20). The mounting adapter (200) is secured to the housing (50) by the fastener assembly (239) and a mounting socket (51) formed on the housing. Various fastener assemblies can be used to secure the adapter to the housing so long as the assembly includes an accessible knob or head such as shown at 240. See claims 7-13.

The mounting adapter 200 includes an arm (210) having a bracket assembly (220) that fits with the head or helmet mount to secure the image intensifier device to the head or helmet mount (page 5, lines 22 and 23; page 6, lines 1 and 2). See claim 13.

VI. Grounds of Rejection to be Reviewed

Applicant requests review and reversal of the rejection of claims 7-13, 15, 18 and 19 as unpatentable under 35 U.S.C. 103 over Bryant et al (U.S. 5,943,174) in view of Schweitzer et al (U.S. 5,867,313), Izumi (Japanese No. 2-118534) and/or Agata et al. (U.S. 6,680,845).

VII. Arguments

I. THE FINAL REJECTION DID NOT PROPERLY CONSTRUE THE SCOPE AND CONTENT OF THE PRIOR ART

"Under 35 U.S.C. 103, the scope and content of the prior art are to be determined;..." *Graham v. John Deere Co.*, 338 U.S. 1, 17; 148 USPQ 459, 467 (S. Ct. 1966)

Graham sets forth the fundamental axiom that guides inquires under 35 U.S.C. 103.

"Among legal standards for determining <u>scope</u> and content of the prior art, are: a prior patent must be considered in its entirety, i.e., as a <u>whole,..." Panduit Corp. v. Dennison</u>

<u>Manufacturing Co.</u>, 810 F.2d 1561, 1568; 1 USPQ2d 1593, 1597 (Fed.Cir. 1987)

Panduit explains how the scope and content of the prior art must be determined.

The final rejection in this application violates both of these mandates. There are three errors in the determination of the scope and content of the prior art and any one of these errors requires a reversal of the final rejection.

1. THE FIRST ERROR

The final rejection includes a first fundamental error with respect to the scope and content of the prior art. The final rejection states that Bryant et al. discloses a

"fastener in the form of a screw having a shape and size similar to those of the objective lens section is <u>implied</u> as can Page 6 of 19

be seen in columns 6-7 and shown in Figures 8-10" (emphasis added).

Bryant et al. does not disclose that the drawings are to scale and, except for the size of the threaded shank of the fastener 240, is silent as to dimensions. The MPEP at Section 2125 states **PROPORTIONS OF FEATURES IN A DRAWING ARE NOT EVIDENCE OF ACTUAL PROPORTIONS WHEN DRAWINGS ARE NOT TO SCALE**. Section 2125 expressly adopts the CAFC's holding in *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956; 55 USPQ2d 1487, 1491 (Fed.Cir. 2000):

"Under our precedent, however, it is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue."

See also In re Wright, 569 F.2d 1124, 193 USPQ 332 (CCPA 1977).

Bryant et al. is completely silent with respect to the sizes or relative proportions of the parts shown in the drawing.

Thus, the final rejection includes an impermissible conclusion based on what the Bryant et al. drawing and specification "<u>implies</u>", but implication is not the standard. Bryant et al. provides no evidence relevant to the size of the lens cap vis-à-vis the lens assembly or the lens cap.

Moreover, neither the Bryant et al drawings nor its specification imply any such relationship as stated in the final rejection. Looking at Figures 8 and 9 of Bryant et al. they do not show both the lens assembly 42 and the head 240 of the fastener assembly. Figures 8 and 9 cannot imply any relationship between them.

With respect to Figure 10, the undersigned has tried to measure the outside diameter of the lens assembly 42 and that of the enlarged head 240 of the fastener assembly. The outside diameter of the lens assembly 42 is about 1 inch and the outside diameter of the head of 240 is about 13/16 of an inch. Thus, even if the drawing could be used, Figure 10 does not show that the size of the lens assembly and head are the same.

Finally, columns 6 and 7 of Bryant et al. do not imply that the size of the lens assembly and head are the same. Nowhere in columns 6 and 7 is there any mention of the lens assembly nor is there any reference thereto.

2. THE SECOND ERROR

The final rejection includes a second fundamental error with respect to the scope and content of the prior art. The final rejection, with respect to Izumi, states that Izumi

"does not clearly state that the lens barrel and the protrusion of the lens cap housing part have the similar dimension; however, the dimension of the lens barrel and the protrusion of the lens cap housing part are inherently the same because the lens cap (4) is able to retain on both the lens barrel (3) or the protrusion."

This statement shows that Izumi has not been considered as a whole. In Izumi the lens cap 4 is retained on the protrusion 22 by rotatable retainers 10 as clearly shown in Figures 4 and 5. The final rejection ignores these retainers and implies that the lens cap (4) is retained on protrusion 22 by an interference fit.

Izumi discloses a camera including a lens main body 2 and a camera main body 9. The lens main body includes a camera ejector 7 that separates the two bodies when it is desirable to remove the lens main body 2 from the camera main body 9. The housing of the lens main body 2 is formed with a protrusion 22 and the lens cap 4 slides on the protrusion - it is pushed along the boss 22 by the camera main body 9 to move the ejector 7 to an inoperative position when the camera is in use.

To operate the ejector 7, the lens cap 4 must be freely slideable on the boss 22 and as is clearly shown in Figs. 4 and 5 of the drawing, rotatable retainers 10 retain the lens cap 4 on the boss 22. The lens cap is not retained by an interference fit.

3. THE THIRD ERROR

The final rejection includes a third fundamental error with respect to the scope and content of the prior art. The final rejection, with respect to Agata et al., states that Agata et al teaches that

"when the device is put in use then the lens cap is removed from the lens barrel (41) and placed in a recess(28)..."

This final rejection reads more into the actual disclosure of Agata et al. then is actually disclosed. Agata et al. discloses an information processing apparatus 1 including a computer body 2 and a camera section 40 (a CCD imager, see col. 9, line 25) having a lens barrel 41 and a lens cap 42 for protecting the lens 43 when the camera is not in use. The lens cap 42 is tethered by a string 45 (see Fig. 2 and col. 9, lines 34-41) and is held in a holding recess 28 formed on the bottom wall 2d of the computer body 2 (see Fig. 4).

Agata et al. does not disclose that the lens cap 42 is retained in the recess 28 by an interference fit. Indeed the lens cap can be held in the recess 28 by the support surface on which the bottom wall 2d of the computer body is sitting. In the drawing, the recess 28 actually looks like a stamped metal part that may act as a clip that holds the lens cap.

4. THE SCOPE AND CONTENT OF THE PRIOR ART DO NOT SUPPORT A CONCLUSION OF OBVIOUSNESS

Consider first the claimed subject matter.

All of the appealed claims recite "a fastener...having an enlarged head". In claim 7, the enlarged head has a

"shape complementary to said lens cap so that said lens cap can be removed from said lens assembly and retained on said head with an interference fit when said assembly is in use";

in claim 13, the enlarged head has

"a circular cross-section having a diameter substantially equal to said first diameter (the diameter of the housing's cylindrical portion) whereby said lens cap can be removably retained on said enlarged head with an interference fit when said monocular is in use";

and, in claim 15, the enlarged head has

"substantially the same cross-sectional shape and dimension as said generally cylindrical portion so that said lens cap can be removed from said generally cylindrical portion and retained on said head with an interference fit when said device is in use".

Bryant et al. does not disclose nor is it evidence implying that the head 240 of a fastener assembly is the same size as the lens assembly or the lens cap. Bryant et al. cannot disclose that a lens cap should be retained on a fastener with an interference fit - it does not disclose a lens cap.

Schweitzer et al. discloses a tethered lens cap, but includes no disclosure that the lens cap is retained on anything let alone the enlarged head of a fastener when the night vision device is in use. Indeed, Schweitzer et al. discloses a dangling lens cap, one source of the problems the claimed invention solves.

Neither Izumi nor Agata et al. disclose a fastener having an enlarged head that is the same size as the lens assembly or the lens cap; neither Izumi nor Agata et al. disclose that the lens cap is stowed anywhere with an interference fit.

It is clear that the scope and content of the prior art falls short of the claimed invention. Not one reference discloses (a) that the size of the lens assembly and the enlarged head of a fastener are the same nor (b) the retention of the lens cap on the enlarged head of a fastener assembly with an interference fit.

With an improper determination of the scope and content of the prior art, the final rejection concludes that

"it would have been obvious...to attach the lens cover onto...a screw head of the adapter...when the screw head

has its size and shape similar to those defined by the objective lens section..." (emphasis added)

This is unsupported speculation. There is no evidence that the screw head has the same size and shape as the objective lens section or the lens cap. Finding it obvious to do something to structure not in evidence is improper.

Use of the word "when" in the underlined quote above flags another problem in the final rejection. The time when the screw head has its size and shape similar to those defined by the objective lens was, in fact, after the Appellant made his invention - not at the time he made the invention as required by § 103. The references do not indicate otherwise.

In fact, in the actual state of the art when Appellant made the claimed invention was not as speculated in the final rejection. The claimed invention is used on the AN/PVS-14 night vision monocular made and sold by ITT Industries, Inc. That monocular has been sold since about 1996 and was modified on July 27, 2004 to include the claimed invention. Prior to July 27, 2004, the I.D. of the lens cap was 1.4 inches, the O.D. of the objective lens assembly was 1.45 inches and the O.D. of the fastener head or knob was 0.995 inches. That was the actual scope and content of the prior art when Appellant made his invention.

On July 27, 2004, the O.D. of the fastener head or knob was increased to 1.45 inches, the same size as the objective lens assembly. All of this is confirmed by the 3 drawings in the Evidence Appendix.

"When" did the screw head and objective lens section have the same shape and size - after the invention, not before as assumed in the final rejection. The final rejection overlooks the need to increase the size of the head and then use it to retain the lens cap.

B. THE FINAL REJECTION IS BASED ON HINDSIGHT

"elements of separate prior patents cannot be combined when there is no suggestion of such combination anywhere in those patents"

Panduit Corp. v. Dennison Manufacturing Co., 810 F.2d 1568; 1

USPQ2d at 1597

In this application there is no motivation or suggestion in the four prior art references to combine them as proposed in the final rejection. Night vision devices are used in the dark, under harsh weather conditions and in dangerous situations. The problems presented are unique and the claimed solution is specific.

Only Bryant et al. and Schweitzer et al. relate to night vision devices and neither retains the lens cap on the enlarged head of a fastener assembly as recited in the appealed claims. Neither disclose an enlarged head of a fastener assembly having the same size and shape as the lens assembly. Neither even recognize the problems presented by a dangling lens cap.

Izumi and Agata et al. do not relate to night vision devices. The apparatus they disclose are not used in the dark, in harsh weather or personally dangerous situations. These disclosures are in non-analogous arts - their devices do not face the unique problems identified above.

Neither Izumi nor Agata et al. disclose interference fits for a lens cap on any other part of their disclosed apparatus. See the discussion of these references above. The retainers 10 disclosed in Izumi require their manipulation in contrast to the claimed interference fit approach. The recess 28 disclosed in Agata et al. requires a tactile approach to locate the recess and to insert the lens cap into the recess. Applicant also contends that Agata et al. does not disclose that the cap is held in the recess with an interference fit. Regardless, imagine trying to use the tactile approach when the user is wearing gloves in harsh weather.

Appellant's disclosure is the only teaching of retaining the lens cap on the enlarged head of a fastener assembly with an interference fit. It is submitted that the final rejection pieces the references together using Appellant's disclosure as a blueprint. This is clearly impermissible hindsight.

In point of fact, the failure of the four prior art references to disclose the claimed elements or suggest the claimed invention is evidence of nonobviousness. See <u>Panduit Corp. v. Dennison Manufacturing Co. SUPRA</u> where the court found:

"Indeed that the elements noted by the court lay about in the prior art available for years to all skilled workers, without as the court found, suggesting anything like the claimed inventions, is itself evidence of nonobviousness". 810 F2d. 1577; 1 USPQ2d at 1605.

After all of the picking and choosing, the final rejection can still not point to a lens cap retained on a the enlarged head of a fastener assembly with an interference fit. Instead, the final rejection <u>assumes</u> that one of the fasteners disclosed in the Bryant et al./Schweitzer et al. combination has the same diameter as the lens assembly and the lens cap. The conclusion that it would be obvious to attach the lens cover to a screw head

"when the screw head has its size and shape similar to those defined by the objective lens section in the device provided by Bryant et al. and Schweitzer et al"

cannot be supported by the references. There is no disclosure in any reference that the size of the screw head is similar to the size of the objective lens section. The combination of references falls short - a critical element is added into the rejection based on Applicant's disclosure. It is improper hindsight and the final rejection must be reversed.

C. CONCLUSION

USPQ2d at 1600.

The claimed invention is a rather simple arrangement that provides an elegant solution to unique problems peculiar to night vision devices. It is not the complex technology usually contemplated when considering night vision inventions. However, technical complexity is not a factor in determining obviousness.

"The statute requires utility, novelty, and nonobviousiness, not complexity."

Panduit Corp. v. Dennison Manufacturing Co., 810 F2.d 1572; 1

In view of the discussion above, it is submitted that obviousness has not been established and reversal of the final rejection is requested.

Respectfully submitted,

Robert P. Seitter, Reg. No. 24,856

Attorney for Applicants

RPS/dhm

Attachments: Appendix A

Appendix B Appendix C

Dated: January 28, 2005

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Appendix A Claims

7. A nigh vision assembly comprising:

an image intensifier device including a housing and a lens assembly operatively arranged therewith for receiving low intensity light; a mounting adapter secured to said housing, said adapter being adapted to be secured to an accessory; a lens cap configured to be removably retained on said lens assembly to protect a lens operatively associated with said lens assembly when said device is not in use; a fastener on one of said device or said adapter, said fastener having an enlarged head with a shape complementary to said lens cap so that said lens cap can be removed from said lens assembly and retained on said head with an interference fit when said assembly is in use.

- 8. A night vision assembly according to claim 7 wherein said fastener secures said adapter to said device.
- 9. A night vision assembly according to claim 8 wherein said lens cap and said head have a cross-sectional circular configurations with slightly different diameters to provide the interference fit.
- A night vision assembly according to claim 8 wherein said fastener is a threaded screw.
- 11. A night vision assembly according to claim 7 wherein said lens assembly has a cylindrical portion extending from said housing and wherein said cylindrical portion and said head have the same configuration and diameter for retaining said lens cap.

12. A night vision assembly according to claim 7 wherein said lens cap is tethered to said device.

A night vision monocular comprising:

an image intensifier housing having a cylindrical portion extending beyond said housing and having a first cross-sectional diameter, an objective lens carried in said cylindrical portion for receiving low intensity light, said housing also carrying an eyepiece for viewing a visible image;

a lens cap tethered to said housing and having a circular cross-section having a diameter slightly different from said first diameter so that said lens cap can be removably retained on said cylindrical portion of said housing with an interference fit to cover and protect said objective lens when said monocular is not in use;

a mounting adapter secured to said housing by a fastener, said adapter also including a bracket operative to secure said adapter to an accessory;

said fastener having an enlarged head with a circular cross-section having a diameter substantially equal to said first diameter whereby said lens cap can be removably retained on said enlarged head with an interference fit when said monocular is in use.

15. A night vision assembly comprising:

an image intensifier device including a housing with a lens assembly having a generally cylindrical portion extending therefrom, said lens assembly arranged for receiving low intensity light; a lens cap configured to be removably retained on said

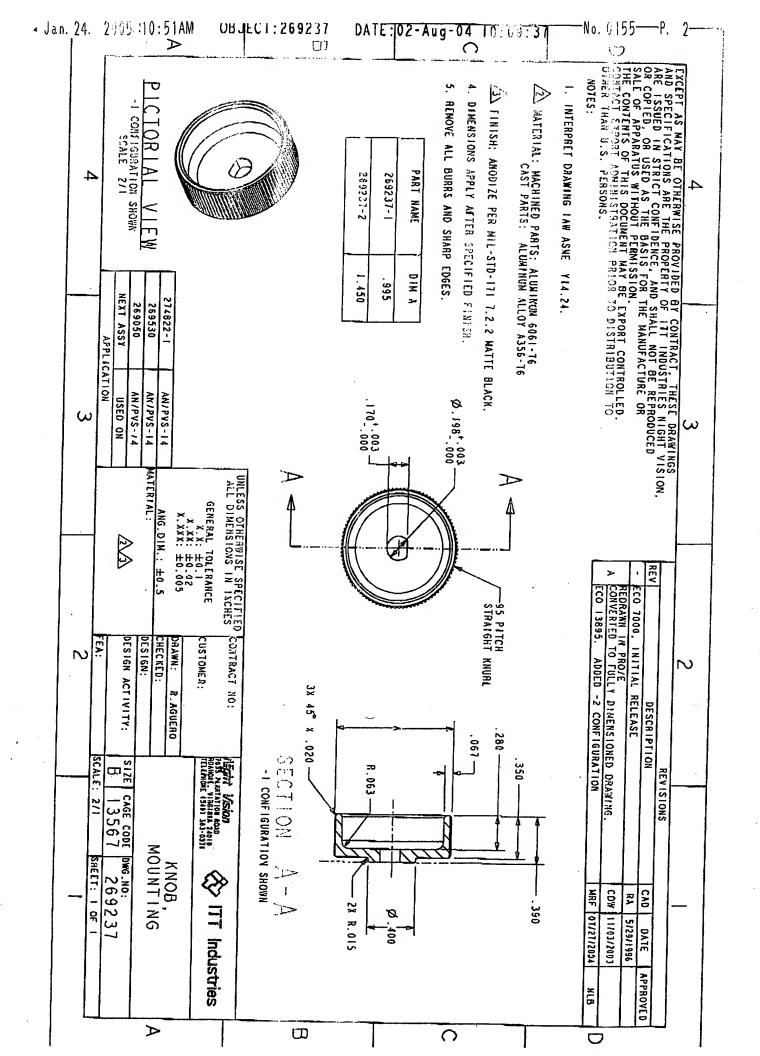
generally cylindrical portion with an interference fit to protect a lens operatively associated with said lens assembly when said device is not in use; a fastener operatively associated with said device, said fastener including an enlarged head having substantially the same cross-sectional shape and dimension as said generally cylindrical portion so that said lens cap can be removed from said generally cylindrical portion and retained on said head with an interference fit when said device is in use.

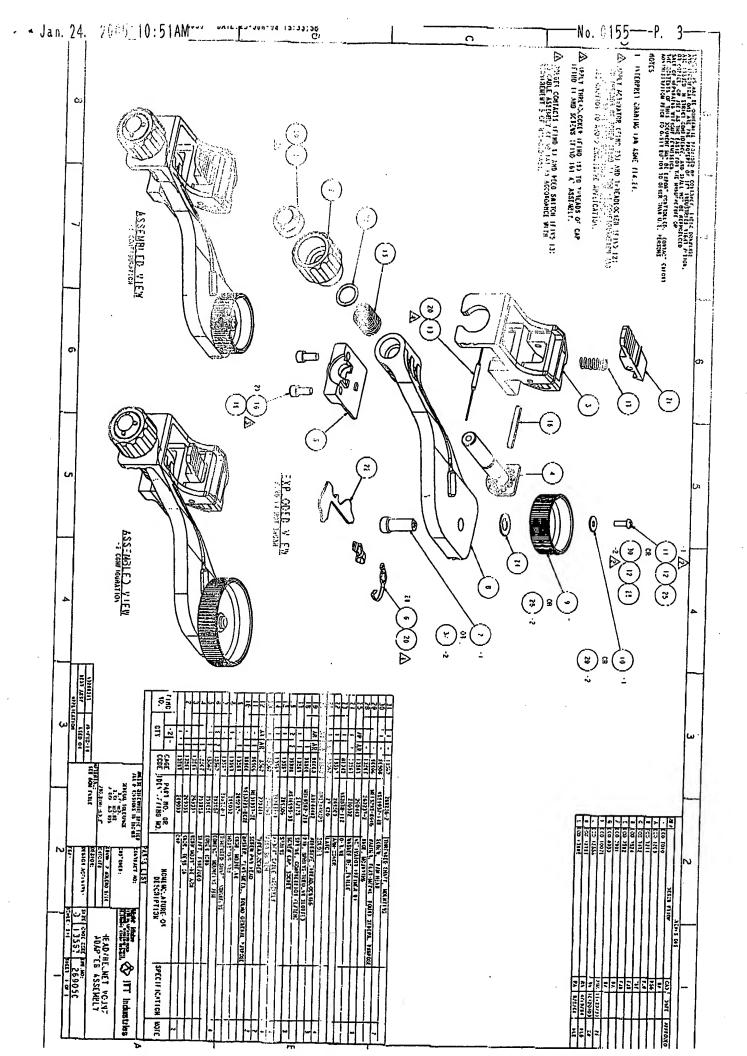
- 18. A night vision assembly according to claim 15 wherein said fastener is a threaded screw.
- 19. A night vision assembly according to claim 15 wherein said lens cap is tethered to said assembly.

Appendix B Evidence

The following drawings are attached:

- 1. Drawing A3144318 (cap, lens)
- 2. Drawing 269237 (knob, mounting)
- 3. Drawing 26905C (head/helmet mount adapter assembly)





Appendix C Related Proceedings Appendix

None

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